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## GENERAL NOTICE

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### DEPARTMENT OF HOUSING

No. 1140

25 August 2006

#### HOUSING CONSUMERS PROTECTION MEASURES AMENDMENT BILL, 2006

The Department of Housing hereby publishes the draft Housing Consumers Protection Measures Amendment Bill, 2006 for public comment.

Interested persons and institutions are invited to submit written comments on the draft Bill to the Director-General, Department of Housing, on or before 26 September 2006.

Comments should be submitted for the attention of –

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REPUBLIC OF SOUTH AFRICA

HOUSING CONSUMERS PROTECTION MEASURES AMENDMENT BILL, 2006

MINISTER OF HOUSING

[B 2006]

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**GENERAL EXPLANATORY NOTE:**

[        ] Words in bold type in square brackets indicate omissions from existing enactments.

\_\_\_\_\_ Words underlined with a solid line indicate insertions in existing enactments.

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**BILL**

To amend the Housing Consumers Protection Measures Act, **1998**, so as to substitute certain definitions; to insert new definitions; to clarify the scope of application of the Act; to make provision for late enrolment and non-declared late enrolment; to make provision for the position **of** owner builders; to extend the warranty scheme to include roof leaks; to make further provision for the use of moneys in the fund; to extend the offences created in the Act; to amend the provisions pertaining to the granting of exemption by the Council, and the lodging of appeals with the Minister; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

**Amendment of section 1 of Act 95 of 1998**

Section 1 of the Housing Consumers Protection Measures Act, 1998 (hereinafter referred to as the principal Act) is hereby amended by-

(a) the substitution in the definition of "business of a home builder" for paragraph (b) of the following paragraph:

"(b) to construct a home for purposes of sale, renting, leasing or otherwise disposing of such a home."

- (b) the substitution in the definition of "business of a home builder" for paragraph (d) of the following paragraph:

"(d) to conduct any other activity that may be prescribed by the Minister for the purposes of this definition[.] .

**[but does not include-**

- (i) the *bona fide* building of a home by any person for occupation by that person;**
- (ii) the *bona fide* assistance to a person contemplated in paragraph (i) by a person who is not a registered home builder, in the building of a home; or**
- (iii) the sale or disposal by a housing consumer of his or her *bona fide* home:]**

- (c) the substitution of the definition of "home builder" for the following definition:

"home builder" means-

- (a) a person who carries on the business of a home builder; and
- (b) a person who falls within the definition of "owner builder" but who has not **been** exempted in terms of section 10A of this Act;

- (d) the insertion after the definition of "inspector" of the following definition:

"late enrolment" means the submission by a home builder, in contravention of section 14 of an application for the enrolment of a home to the Council after construction has **started;**

- (e) the insertion after the definition of "Minister" of the following definition:

"National Housing Code means-

- ~~(a) the National Housing Code as contemplated in section 4 of the Housing Act, 1997 (Act No 107 of 1997); or~~
- ~~(b) any other policy, administrative or procedural guidelines issued in terms of the Housing Act, 1997, which repeals or substitutes the National Housing Code.”~~

- (f) the insertion after the definition of “NHBRC Technical Requirements” of the following definition:

~~“non-declared late enrolment” means where a home builder does not declare the fact that construction has commenced at the time of enrolment and late enrolment is detected by the Council;~~

- (g) the insertion after the definition of “organ of state” of the following definition:

~~“owner builder” means –~~

- ~~(i) any person that *bona fide* builds a home for occupation by him or herself; or~~
- ~~(ii) any person, who is not a registered home builder, that *bona fide* assists a person contemplated in paragraph (i) in the building of a home, unless such person is guilty of conduct as prescribed by the Minister.”~~

- (h) the insertion after the definition of “owner builder” of the following definition:

~~“PHP Project” means a housing project approved in terms of the provisions of Chapter 8 of Part 3 of the National Housing Code: Housing Subsidy Scheme: People’s Housing Process, or any other policy, administrative or procedural guidelines issued in terms of the Housing Act, 1997, which repeals or substitutes the National Housing Code;”~~

### **Insertion of section 1A in Act 95 of 1998**

The following section is hereby inserted after section 1 of the principal Act:

**"1A Application of Act****This Act –**

- (a)** applies to any person who carries on the business of a home builder;
- (b)** applies to any person who falls within the definition of "owner builder" and who has not been exempted in terms of section 10A of this Act, in which case such person shall be deemed to be a home builder: and
- (c)** does not apply to any person who physically uses his or her own labour to build a house for his or her occupation if the house is part of an approved PHP Project."

**Amendment of section 7 of Act 95 of 1998**

Section 7 of the principal Act is hereby amended:

- (a) by the substitution for subparagraph (iii) of paragraph (a) of subsection (1) of the following subparagraph:

"(iii) prescribing enrolment fees and late enrolment fees, including the method of calculating such fees in respect of homes or categories of homes and other fees, excluding the fees contemplated in subsection (2);"

- (b) by the substitution for subparagraph (iv) of paragraph (a) of subsection (1) of the following subparagraph:

"(iv) prescribing procedures for enrolment, late enrolment, nondeclared late enrolment and cancellation of enrolment;"

- (c) by ~~the~~ insertion after subparagraph (iv) of paragraph (a) of subsection (1) of the following subparagraph:

“(v) governing the application of NHBRC regulatory measures to homes financed by a state housing subsidy;”

(d) by the substitution for paragraph (e) of subsection (2) of the following paragraph:

“(e) the minimum and maximum amounts which may be expended under section 17 (1) in respect of any home pursuant to the failure of a home builder to meet his or her obligations in terms of section 13 (2)(b) (i) [.] , and for these purposes the Minister may –

(i) prescribe any and all costs that may be included in a claim; and

(ii) prescribe the type of costs and losses that may not be paid out of the fund.”

#### **Insertion of section 10A in Act 95 of 1998**

The following section is hereby inserted after section 10 of the principal Act:

#### **“10A Owner builder exemption**

An owner builder must apply in terms of section 29 of the Act to the Council for exemption from the application of sections 10 and 14 of the Act.”

#### **Amendment of section 14 of Act 95 of 1998**

Section 14 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) A home builder shall not commence the construction of a home the acquisition of which [ , **except in respect of any deposit payable,**] will be financed solely from the proceeds of a state housing subsidy, unless—

- (a) the home builder has submitted the prescribed documents and information to the Council in terms of the agreement contemplated in section 5 (4) (c);
- (b) the Council has accepted the submission contemplated in paragraph (a) and has entered it in the records of the Council;
- (c) the Council has issued a certificate of proof of enrolment of the project in the prescribed form and manner to the home builder; and
- (d) the MEC has paid the prescribed fee to the Council in terms of the agreement contemplated in section 5 (4) (c)."

#### **Insertion of section 14A in Act 95 of 1998**

The following section is hereby inserted after section 14 of the principal Act:

#### **"14A Late enrolment and non-declared late enrolment**

##### (1) Where a home builder –

- (a) in contravention of section 14 of the Act submits an application for the enrolment of a home to the Council after construction has started; or
- (b) does not declare the fact that construction has commenced at the time of enrolment, and late enrolment is detected by the Council, who has reason to believe that such non-declaration was a deliberate attempt to avoid enrolment, or the inspection process,

the Council must require the home builder to satisfy the Council that the construction undertaken at the time is in accordance with the NHBRC technical requirements so as to take prudent measures, contemplated in section 16(1) of the Act, to manage the risks pertaining to the fund.

##### (2) In the case of late enrolment and non-declared late enrolment, the home builder must–



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- (a) submit to the Council all documentation and information as prescribed in the Council rules;
- (b) at the request of the Council, pay a prescribed late enrolment fee in an amount determined by the Council for a special inspection to be undertaken by the Council to enable the inspectorate to determine compliance with NHBRC technical requirements, prior to the acceptance of enrolment;
- (c) at the request of the Council, and prior to the acceptance of the enrolment, rectify any defects detected during the inspection contemplated in paragraph (b) -
- (i) that may influence the structural integrity of the home: or
- (i) that constitute non-compliance with the NHBRC technical requirements,
- at the home builder's cost and under the supervision of the competent person appointed by the home builder;
- (d) at the request of the Council, in circumstances where an inspector is unable to determine compliance with the NHBRC technical requirements, for whatever reason, appoint a competent person -
- (i) to inspect the home; and
- (ii) to complete the competent person late enrolment report in the form prescribed in the Council rules, to confirm compliance with the NHBRC technical requirements.
- (e) undertake, and pay for, any costs resulting from work that needs to be exposed to enable the competent person to address all questions raised in the competent person late enrolment report contemplated in subparagraph (d)(ii); and

- (f) at the request of the Council provide any surety, guarantee, indemnity or other security considered reasonable by the Council to satisfy its obligations under section 16(1) of the Act."

(3) Notwithstanding the provisions of this section, the Council may prescribe disciplinary measures for late enrolment and non-declared late enrolment which are not inconsistent with this Act.

#### **Amendment of section 16 of Act 95 of 1998**

Section 16 of the principal Act is hereby amended by the substitution for subsection (6) of the following subsection:

"(6) If at any time the funds of the Council appear insufficient to meet anticipated demands, the Council may, on the recommendation of the funds advisory committee and after the procedures referred to in section 17 (3), (4) and (5), with the necessary changes required by the context, have been followed, increase the fees payable by home builders and MEC in respect of the enrolment of homes contemplated in sections 14 and 14A."

#### **Amendment of section 17 of Act 95 of 1998**

Section 17 of the principal Act is hereby amended:

- (a) by the substitution for paragraph (a) of subsection (1) of the following paragraph:

\* (a) within –

- (i) five years of the date of occupation a major structural defect has manifested itself in respect of a home as a result of non-compliance with the NHBRC Technical Requirements, and has been notified to the home builder within that period;

(ii) 12 months of the date of occupation roof leaks attributable to workmanship, design or materials have manifested itself in respect of a home, and has been notified to the home builder within that period;"

(b) by the substitution for subsection (2) of the following subsection:

"(2) Subject to subsections (3), (4) and (5), if money is not available or is expected not to be available for that purpose due to future demands on the fund, the Council ~~may~~ **[reduce any amount, subject to section 7 (2) (e), that may be expended in terms of subsection (1) or refuse such claims.]**

(a) subject to section 7(2)(e), reduce any amount that may be expended in terms of subsection (1);

(b) in exceptional circumstances, instead of having a defect rectified, make payment to the housing consumer in full and final settlement of any claim; or

(c) refuse such claims."

(c) by the substitution for paragraph (b) of subsection (5) of the following paragraph:

"(b) prescribe increased enrolment or late enrolment fees under section 16(6),"

#### **Amendment of section 21 of Act 95 of 1998**

Section 21 of the principal Act is hereby amended by the substitution for paragraph (b) of the following paragraph:

"(b) contravenes a provision of section 10(1) or (2), 13(7), 14(1) or (2), 18(1) or (2) or 19(5)."

#### **Amendment of section 22 of Act 95 of 1998**

Section 22 of the principal Act is hereby amended by the insertion after subsection (4) of the following subsection:

“(5) Irrespective of subsections (1) to (4), any person who feels aggrieved by any decision that the Council has made in terms of section 29 of this Act, may, within one month from the date on which such decision was made known by the Council, lodge an appeal in writing with the Minister against the decision, and thereupon the Minister may confirm, set aside or amend such decision of the Council.”

#### **Substitution of section 29 of Act 95 of 1998**

The following section is hereby substituted for section 29 of the principal Act:

“(1) The **[Minister] Council** may, **[on the recommendation of the Council]** on application made to it, in the prescribed format, in exceptional circumstances and on the conditions that the Minister may prescribe [determine] in general or in any particular case, exempt a person or a home from any provision of this Act, if the **[Minister] Council** is satisfied that—

- (a) the granting of the exemption would be in the public interest;
- (b) the granting of the exemption would not undermine the objectives of this Act, or the effectiveness of the Council; or
- (c) should the exemption not be granted, the effect would be extremely prejudicial to the interests of the applicant and housing consumers.

(2) The Council must reach and make known a decision within 60 days of receipt of an application made to it.

(3) An exemption contemplated in subsection (1) is not transferable.”

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**Short title and commencement**

This Act is called the Housing Consumers Protection Measures Amendment Act, 2006, and comes into operation on a date to be fixed by the President by proclamation in the *Gazette*.

## MEMORANDUM ON THE OBJECTS OF THE HOUSING CONSUMERS PROTECTION MEASURES AMENDMENT BILL, 2006

### 1. BACKGROUND

The Bill seeks to rectify certain interpretation and implementation problems which have arisen since the promulgation of the Housing Consumers Protection Measures Act, 95 of 1998 (the Act).

### 2. OBJECTS OF THE BILL

2.1 The Bill seeks to amend the definition of the expression "business of a home builder" by –

- (a) inserting the words "renting" and "leasing" in paragraph (b) of the definition, which deals with acts that are regarded as constituting disposal of a home; and
- (b) deleting paragraph (d) of the definition. The wording of paragraph (d) has resulted in so-called 'owner builders' being excluded from the scope of application of the Act. In broad terms an owner builder is a person who wishes to build a home for occupation by him or herself, and who utilises own resources such as labour and financing. In these cases application of the Act would result in an absurd situation where the mentioned person is in fact protected against him or herself.

Although this fact is recognised, it was never the intention of the legislature to totally exclude such 'owner builders' from the application of the Act, but rather that they be entitled to apply for exemption from the provisions of the Act, thereby ensuring that they are indeed *bona fide* owner builders, and not just builders wishing to escape from the letter of the law.

As paragraph (d) of the definition has not achieved this, it is being deleted and substituted with a substantive definition of, and provisions pertaining to, "owner builders".

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- 2.2 The definition of "home builder" is amended to include "owner builders" who have not been exempted in terms of the Act.
- 2.3 Definitions for "late enrolment" and "nondeclared late enrolment" are inserted. Although these issued have in the past been dealt with in Regulations issued under the Act, they are not defined in the Act, nor does the Act contain any specific provisions pertaining thereto. This situation is rectified **by** the insertion of the mentioned definitions, as well as making specific provision therefore in the proposed section 14A, dealt with **below**.
- 2.4 Definitions for "National Housing Code" and "PHP project" are inserted, as **these** expressions are contained in the substantive provisions proposed by this Bill.
- 2.5 A definition for "owner builder" is inserted after the definition of "organ of state".
- 2.6 A new section 1A is inserted to provide for the scope of application of the Act.
- 2.7 Section 7, dealing with the regulating measures that the Council and the Minister may prescribe, is amended to include measures pertaining to late enrolment, non-declared late enrolment and late enrolment fees.
- 2.8 A new section 10A is inserted to enable "owner builders" to apply for exemption from *the* provisions of the Act.
- 2.9 Section 14A is inserted to ensure that the Act contains substantive provisions pertaining to, and regulating, late enrolment and non-declared late enrolment. The proposed section 14A consists of a revised combination of the existing regulations 14 and 15, as contained in the Council Rules published under Regulation No. R. 1408 and dated 1 December 1999 (*Gazette* No. 20658).
- 2.10 Section 17 of the Act is amended to extend the cover provided by the Council's warranty scheme to include roof leaks, and to enable the Council, in exceptional circumstances, instead of having a defect rectified, to make payment to the housing consumer in full and final settlement of a claim.
- 2.11 The list of contraventions of the Act which constitutes offences, as set out in section 21, is amended to include the section 18(2) duty of a conveyancer to ensure that a home builder is registered before attending to the registration of a mortgage bond.

- 2.12** Section **22** is amended by the insertion of a new subsection (5) which enables persons who are aggrieved by any decision made by the Council in terms of section **29**, to lodge an appeal with the Minister. This is necessitated by the fact that section **29** is being amended to allow the Council, and not the Minister, to grant or refuse applications for exemption.
- 2.13** Section **29** is amended to allow the Council to grant or refuse applications for exemption, In its current format the **section** empowers the Minister to consider applications for exemption, based on recommendations provided by the Council. As this process firstly causes lengthy delays due to the extensive responsibilities of the Minister, and as the technical expertise necessary to properly evaluate applications is not available in the Department of Housing, the responsibility is best vested in the Council. A safeguard in the form of an appeal process is, however, built into section **22** to ensure that exemptions are not refused unreasonably.

### **3. PERSONS CONSULTED**

The draft Bill was published for public comment, but response was poor and comments were only received from the former Special Investigating Unit and the KwaZulu Natal Institute for Architecture. Consultation was also undertaken with the Council and the State Law Advisers, and it is proposed that the Bill be published in the Gazette again.

### **4. IMPLICATIONS FOR PROVINCES**

None

### **5. FINANCIAL IMPLICATIONS FOR STATE**

None



## 6. PARLIAMENTARY PROCEDURE

- 6.1 The State Law Advisers and the Department of Housing are of ~~the~~ opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set ~~out in~~ section 74 or 76 of the Constitution applies.
- 6.2 The State Law Advisers are of the opinion that it is not necessary to ~~refer~~ this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 41 of 2003, since it does not contain provisions pertaining to customary law or customs of traditional communities.
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